



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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Appeal of Orange County Power Authority
(ID 243) from Citation No. E-4195-0134 in
the amount of \$147,408.00 issued by the
Consumer Protection and Enforcement
Division.

**NOTICE OF APPEAL OF ORANGE COUNTY POWER AUTHORITY
FROM CITATION NO. E-4195-0134**

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May 24, 2023

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Pursuant to Resolutions ALJ-377 and E-4195, Orange County Power Authority (“OCA”) hereby provides this Notice of Appeal and requests an evidentiary hearing with respect to Citation No. E-4195-0134 (“Citation”). The California Public Utilities Commission’s (“Commission”) Consumer Protection and Enforcement Division (“CPED”) issued the Citation for \$147,408.00 (the “Penalty”) on April 24, 2023, regarding OCA’s 2023 Year Ahead (“YA”) Resource Adequacy (“RA”) compliance filing.¹ This notice is timely because it has been submitted to the Commission within 30 days of the date of the Citation.

OCA does not deny that it was deficient in satisfying its 2023 YA RA obligations by Commission-imposed deadlines but asks the Commission to exercise its broad discretion to dismiss the Citation due to the unavailability of RA resources. OCA in good faith undertook commercially reasonable efforts to satisfy its RA obligations but encountered a constrained market that lacked 2023 RA resources that satisfy Commission requirements. OCA nevertheless employed a multi-faceted and sustained procurement approach to meet its RA obligations and

¹ OCA filed its 2023 YA RA compliance showing on October 27, 2022 and filed a revised showing on October 29, 2023.

continues to engage the market through various channels to procure additional RA for 2023. OCPA therefore respectfully asks that the Commission dismiss the Citation on the grounds that it was impossible for OCPA to satisfy its 2023 YA RA obligations by the Commission's deadlines due to a lack of conforming RA products. OCPA also encourages the Commission to consider its policy discretion in this area to dismiss the Citation or reduce the Penalty to reflect, among other things, the realities of a dysfunctional RA market and OCPA's size and status as a relatively newer load-serving entity ("LSE") and its continued efforts to satisfy its 2023 RA allocations.

I. BACKGROUND

A. Orange County Power Authority

OCPA is a California Joint Powers Authority ("JPA") formed in accordance with Government Code section 6500 *et seq.* (Joint Exercise of Powers Act) and Public Utilities Code section 366.2 and established in 2020 to implement a community choice aggregation ("CCA") program for electric customers within the jurisdictional boundaries of its members. OCPA filed its Implementation Plan and Statement of Intent ("Implementation Plan") with the Commission on December 28, 2020 and obtained certification on March 8, 2021. OCPA is a relatively new CCA and market entrant that initiated retail electric service to non-residential customers in April 2022 and began serving residential accounts in October 2022. OCPA currently services customers located within the cities of Buena Park, Fullerton, Huntington Beach, and Irvine. OCPA is a small retail seller providing retail electric service to less than 300,000 accounts with an approximate annual load of slightly over 3,000 GWh.

B. OCPA's 2023 RA Procurement Efforts

OCPA undertook an exhaustive effort to procure 2023 RA but found it impossible to procure sufficient conforming RA products prior to making its 2023 YA RA filing. OCPA began

evaluating its compliance options early and utilized a variety of procurement tools to satisfy its RA obligations. These efforts included solicitations, bilateral negotiations, and informal outreach to entities with RA for sale. Unfortunately, OCPA encountered significant procurement challenges, including insufficient supply and market withholdings, and astronomical pricing that is more reflective of the current issues in the RA market than of typical supply and demand issues found in a healthy functioning market. As the evidence in this proceeding will show, OCPA in good faith attempted to comply with the Commission's RA compliance showing requirements but encountered a dysfunctional market in which sufficient RA was unavailable to purchase to satisfy OCPA's RA allocation. For the foregoing reasons and as further detailed below, OCPA respectfully asks the Commission to dismiss with prejudice the Citation or, in the alternative, reduce the Penalty to a reasonable amount consistent with the public interest.

II. BASIS FOR APPEAL

OCPA appeals the Citation on the following grounds:

1. It was impossible for OCPA to satisfy its 2023 YA RA obligations by Commission deadlines.
2. To the extent it was not literally impossible for OCPA to satisfy its 2023 YA RA obligations by Commission deadlines, it was commercially impracticable, and therefore functionally impossible, for OCPA to do so.
3. The Penalty process is being enforced as a strict liability regime where the Penalty is excessive; does not reflect the severity of the offense or OCPA's conduct to avoid, detect, or rectify the violation; and imposing the Penalty on OCPA will not serve the public interest because a penalty does not function as a deterrent where compliance is impossible.

4. The Commission has discretion to dismiss or reduce the Citation based on the affirmative defenses of impossibility and commercial impracticability and other considerations raised herein, including Commission policies.

III. DISCUSSION

A. Burden of Proof

CPED has the burden to prove by a preponderance of the evidence that a violation of the Commission's RA requirements has occurred and OCPA, as appellant, must prove its affirmative defenses.² Accordingly, CPED must open and close the hearing, though the Administrative Law Judge ("ALJ") may in his or her discretion alter the order of presentation.³

B. Affirmative Defenses: Impossibility and Commercial Impracticability

It was impossible for OCPA to satisfy its 2023 YA RA compliance filing obligations, despite OCPA's good faith efforts to do so, because of RA market conditions outside of OCPA's control. OCPA thereby asserts as its *first affirmative defense* the defense of "impossibility." The affirmative defense of impossibility is widely recognized in contract law and regulatory matters and has in fact arisen in the course of RA citation appeal proceedings at the Commission. Indeed, the Commission recognized the doctrine of impossibility as an affirmative defense to an RA procurement deficiency when resolving San Jose Clean Energy's appeal of Citation No. E-4195-0052.⁴ The Commission has since vacated ALJ-382,⁵ but did so specifically to let SJCE present detailed factual evidence to support its affirmative defense of impossibility in that proceeding. OCPA will in fact provide detailed factual evidence in this proceeding to show that it was

² Resolution ALJ-377, Appendix A – Citation Appellate Rules and General Order 156 Appellate Rules, ("Citation Appellate Rules"), Rule 11.

³ *Id.*

⁴ Resolution ALJ-382 at 4.

⁵ K.19-03-024, Order Granting Rehearing of Resolution ALJ-382 and Vacating Resolution at 6 (Dec. 17, 2021).

impossible for OCPA to satisfy its 2023 YA RA compliance filing showing and that the Citation should therefore be dismissed.

OCA will also show that additional RA available in the market was priced far beyond what could be considered reasonable based on historic RA pricing—thereby making it impossible to procure, practically speaking—and OCA therefore asserts as its *second affirmative defense* the doctrine of “commercial impracticability.” California courts have expanded the doctrine of impossibility to excuse actions that are so cost prohibitive or impracticable to take that performance effectively becomes impossible.⁶ Like the doctrine of impossibility, the sub-doctrine of commercial impracticability can function to excuse performance where performance is commercially infeasible or extremely burdensome for an entity to perform.⁷ Here, OCA could have procured additional RA—if at all—only at excessive and unreasonable costs, thereby making compliance commercially impracticable. OCA therefore seeks dismissal of the Citation, or in the alternative a reduction to the Penalty, to reflect that it was impossible for OCA to satisfy its 2023 YA RA allocations by Commission-imposed deadlines.

C. The Citation and Associated Penalty Are Contrary to Commission Policy, Not in the Public Interest, and Should Be Dismissed, or in the Alternative Reduced

The Commission is not required to issue a citation for a specified violation.⁸ Indeed, the Commission may initiate any authorized formal proceeding or pursue and other remedy authorized

⁶ *Mineral Park Land Co. v. Howard*, 172 Cal.289, 293 (1916).

⁷ See Uniform Commercial Code (“UCC”) § 2-615 (Excuse by Failure of Presupposed Conditions) and *City of Vernon v. City of Los Angeles*, 45 Cal.2d 710, 719 (1955) (citing to *Mineral Park*, 172 Cal.289, for the proposition that “[a] thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.”)

⁸ See, e.g., Resolution E-4195, Appendix A at 2.7 for the rule that, in an RA Citation appeal, “any remedy available may be imposed, and the remedy shall not be mandated by or limited to the Scheduled Penalty.”

by the California Constitution, the Public Utilities Code, other state or federal statutes, court decisions or decrees, or otherwise by law or equity when enforcing compliance with RA filing obligations. In fact, the Legislature authorized the Commission to determine “the most efficient and equitable means” for achieving the RA program’s goals and to use its enforcement power to ensure compliance.⁹ Thus, the Commission has broad discretion over the RA program, including the discretion to dismiss the Citation or reduce the Penalty. OCPA encourages the Commission to exercise this broad discretion to reduce or eliminate the Penalty because doing so aligns with the RA program goals.

The Commission established the RA program’s procurement obligations to, among other things, achieve the program’s goal of reducing reliance on California Independent System Operator (“CAISO”) backstop procurement and adopted the RA penalty program to induce LSE compliance with those obligations.¹⁰ But a penalty cannot induce compliance or advance RA program goals where, like here, sufficient commercially reasonable RA is unavailable for purchase. The Commission therefore has reasonable policy grounds for exercising its discretion to dismiss the Citation or reduce the Penalty and doing so would not conflict with the Commission’s RA program goals.

In fact, Public Utilities Code section 380 requires the Commission to enforce its RA requirements in a non-discriminatory and effective way.¹¹ The Commission therefore must consider the fact that disparate market power is causing the system capacity market to fail when developing program rules and assessing penalties for RA deficiencies. Indeed, the Commission

⁹ Pub. Util. Code § 380(e) and (h).

¹⁰ Pub. Util. Code § 380(h)(7); D.05-10-042 at 93-94 (finding the System RA penalty program “appropriate to induce compliance with the RA obligation”); D.06-06-064 at 66.

¹¹ Pub. Util. Code § 380(e).

already recognized these market failures when it established its prior Local RA waiver program. In establishing the right to seek a waiver, the Commission found that “measures that are proposed to promote greater grid reliability should be evaluated by weighing their expected costs against the value of their expected contribution to reliability.”¹² The Commission thereby implicitly recognized that market factors beyond the control of an LSE may cause prices to reach levels that prompt the Commission to excuse LSE compliance with RA procurement obligations as a necessary “market power mitigation measure.”¹³ The disparate treatment of Local RA deficiencies compared to System or Flexible RA ignores the realities of the current RA market, is therefore arbitrary, and the Commission should establish waiver programs for System and Flexible RA when those products are unavailable. However, even without these program changes, the Commission can exercise its broad discretionary enforcement authority to eliminate or reduce the Penalty and doing so would be consistent with its RA program goals.

D. The Commission’s Five-Factor Test Favors Reducing the Penalty

The Commission considers five factors when assessing the appropriate level of a fine and these factors favor reducing or eliminating the Penalty because of the limited severity of the offense and OCPA’s size, status as a relatively newer market entrant, and OCPA’s conduct (*e.g.*, its continued good faith efforts to procure sufficient RA). The Commission developed its five-factor test after considering the “past practices of this and similar regulatory agencies”¹⁴ and the test is therefore consistent with well-established regulatory policy with wide-ranging applicability. In considering a penalty, the Commission will consider the two general factors of (1) the severity of the offense and (2) the conduct of the utility before, during, and after the violation, as well as

¹² D.05-10-042 at 8.

¹³ D.06-06-066 at 71.

¹⁴ D.98-12-075 at 4.

(3) the utility's financial resources, (4) the totality of the circumstances in furtherance of the public interest, and (5) the role of precedent.¹⁵ The Commission has consistently employed this test to assess citation program fines and applied it to approve a settlement agreement between Pacific Gas and Electric Company ("PG&E") and CPED related to RA procurement deficiencies.¹⁶ Here, the test favors reducing the Penalty because the offense was not severe and because OCPA in good faith undertook all commercially reasonable efforts to satisfy its RA allocations.

IV. PROCEDURAL REQUEST

OCPA requests a hearing on the Citation, including the ability to submit prepared direct and reply testimony. OCPA also hereby expresses its interest in utilizing the Commission's alternative dispute resolution ("ADR") program.

V. PRAYER FOR RELIEF

For the reasons stated above, Orange County Power Authority asks the Commission to dismiss Citation No. E-4195-0134. Alternatively, if the Commission decides a penalty is justified, OCPA asks that the Commission exercise its discretion to reduce the Penalty to reflect the realities of a constrained RA market and OCPA's efforts nonetheless to satisfy its RA obligations.

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¹⁵ D.98-12-075 at 4, 27-29. Similarly, both the Supreme Court of the United States ("U.S.") and the California Supreme Court have relied on the principle of proportionality to identify four considerations a court should make in determining whether a fine violates the Eighth Amendment of the U.S. Constitution's prohibition against excessive fines. *U.S. v. Bajakajian* (1998) 524 U.S. 321, 337-38 and *People ex rel. Lockyer v. RJ Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728.

¹⁶ D.12-02-030.

Dated: May 24, 2023

Respectfully submitted,

By: 

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Privacy Notice

This message is to inform you that the Docket Office of the California Public Utilities Commission (CPUC) intends to file the above referenced Notice of Appeal electronically instead of in paper form as it was submitted.

Please note: Whether or not your Notice of Appeal is filed in paper form or electronically, Notices of appeal filed with the CPUC become a public record and may be posted on the CPUC's website. Therefore, any information you provide in the Notice of Appeal, including, but not limited to, your name, address, city, state, zip code, telephone number, E-mail address and the rationale of your Notice of Appeal may be available on-line for later public viewing.

Having been so advised, the Undersigned hereby consents to the filing of the referenced Notice of Appeal.



Signature (same as person authorized to sign the Notice of Appeal)

May 24, 2023

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



☐ I hereby state that I will comply with Citation No. E-4195-0134, dated April 24, 2023, and herewith pay a fine in the amount of \$147,408.00.

- Please make check payable to the California Public Utilities Commission and send, along with a copy of this form, to:

CALIFORNIA PUBLIC UTILITIES COMMISSION**Fiscal Office**

**505 Van Ness Ave., Room 3000
San Francisco, CA 94102**

- Please PDF a copy of this form to Stanley Lee at [stanley.lee@cpuc.ca.gov].
- You may direct all questions regarding this citation to Stanley Lee at [415-703-4420] or [stanley.lee@cpuc.ca.gov].

I hereby acknowledge that if I do not appeal the citation, and do not pay the full amount within 30 days, any unpaid balance shall accrue interest at the legal rate of interest for judgments, and Commission Staff and the Commission may take action provided by law to recover unpaid penalties and ensure compliance with applicable statutes and Commission orders, decisions, rules, directions, demands or requirements.

☒ I hereby appeal Citation No. E-4195-0134, dated April 24, 2023.

- To appeal this citation, follow the directions described in this citation, and described in detail in Appendix A of Resolution ALJ-377 (both attached herein).
- Please PDF a copy of this form to Stanley Lee at [stanley.lee@cpuc.ca.gov].

Signature: _____

A handwritten signature in black ink, appearing to read "Ryan M. F. Baron", is written over a horizontal line.

Name and Title: Ryan M. F. Baron, Attorney for Orange County Power Authority

Name of Company: Best Best & Krieger LLP

Citation No.: E-4195-0134

Date: May 24, 2023